IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER 8632/20

In the matter between:

DIGMORE PROP CC Applicant

And

LANGVERWACHT LANDSCAPING (PTY) LTD 1st Respondent

MINISTER OF HUMAN SETTLEMENTS, WATER

AND SANITATION 2nd Respondent

JUDGMENT DATED 07 JUNE 2021

KUSEVITSKY, J

Introduction

[1] In this application, the Applicant seeks an interdict restraining the First Respondent from utilising a borehole, referred to in these proceedings as "borehole 1", in violation of the National Water Act no 36 of 1998 ("National Water Act") and from utilising the leased property for any purpose other than residential and agricultural purposes. In the alternative, the Applicant seeks an interim interdict pending the final determination of an action already instituted by the Applicant under case number 23264/18 ("the action"), restraining the First Respondent from utilising borehole 1 on the leased property in violation of the National Water Act and from utilising the leased property for any other purpose than residential and agricultural purposes.

[2] In the further alternative and in the event of the Court refusing to grant an interdict against the First Respondent, the Applicant applies for a mandamus directing the Second Respondent to take and pursue immediate steps to prevent the First Respondent from further violating the National Water Act in respect of the water resources upon and available to the leased premises.

[3] The Second Respondent has not opposed these proceedings and abides by the decision of the court.

Background

[4] During May 2010, the Applicant and the First Respondent concluded a written agreement of lease in terms whereof the Applicant leased a portion of land comprising 2HA of ground including cottages, owned by the Applicant to the First Respondent for a period of five years ("the leased property"). When that lease

expired, the parties entered into a new written lease agreement with similar terms during July 2015 (the "lease agreement").

[5] The Applicant alleges that the First Respondent breached the provisions of the lease agreement and that such breach entitled the Applicant to cancel the lease agreement on 12 September 2018, alternatively on 31 October 2018.

[6] The First Respondent disputes that it was in breach of the provisions of the lease agreement when the Applicant purported to cancel the lease agreement, or that the Applicant was entitled to cancel the lease agreement when it purported to do so.

[7] On 19 December 2018, the Applicant instituted an action in this Court against the First Respondent as stated above, in which action the Applicant claims *inter alia* an order confirming the cancellation of the lease agreement and ejectment of the First Respondent. In respect of the averments made and arguments presented in this application surrounding the merits or demerits thereof, I am not going to deal with the validity, or not, of the cancellation of the lease agreement to the extent that that is a dispute which has to be adjudicated in the action proceedings. What is relevant for the purpose of this application, is whether the Applicant has satisfied the requirements for the relief to which it claims.

[8] The Applicant states that the First Respondent's first lease agreement entitled it to use the premises for residential and agricultural purposes only[1]. It also claims that the First Respondent was limited to operating a nursery only, as is evidenced by clause 16 of the first lease agreement which states the following:

[1] Clause 10.1 of the Lease agreement dated 25 August 2010.

"*16. The coming into effect of this lease agreement is subject to the Lessee successfully concluding an agreement with the Lessor's current Lessee of the premises, Samgro CC, in term of which the Lessee is to purchase from Samgro CC all nursery tunnels, planting lanes and general equipment used by Samgro CC in the operation of its* ***nursery activities*** *on the premises. The Lessee shall use its best endeavours to procure the fulfilment of this suspensive condition within 21 (twenty-one) days after the signature of this agreement …*"

[9] Moreover, the first lease agreement also regulated the First Respondent's water usage on the property, which is evident by the following clause:

"*14. <u>WATER & ELECTICAL COSTS</u>*
The 2 ha allocation of scheme water cost shall be solely for the use of the Lessee unless in times of emergency or borehole pump failure, the cost of which will be invoiced annually by the Lessor on receipt of the account."

[10] The second lease agreement had the same provisions in respect of the above usage and enjoyment of the leased property as the first agreement.

[11] It is common cause that borehole 1 supplies household water to the remainder of the property occupied by the Applicant. The pump to the borehole is connected to a power supply situated on the leased property. Clause 13 of the lease agreement records that whilst the Applicant would be entitled to utilise the water from the borehole, the First Respondent would pay the electrical charges in respect thereof. It was said that the second borehole on the property is not viable. The water emanating from borehole 1 is the only source of potable water currently available on the property.

[12] The other water sources are the water from the Moddergat River which is primarily available over the winter period and the stream is not viable particularly

during the dry summer months. The third source is water from the Theewaterskloof scheme. This supply is not potable water.

[13] According to the Applicant, the First Respondent was only entitled to utilise the leased property for residential and agricultural purposes and for no other purpose.

[14] The First Respondent has admitted that it conducts the business of a nursery and landscaping business from the leased premises but denies that it is operating its business for commercial purposes.

The Applicant's submissions

[15] The grounds upon which the Applicant bases its application for interdictory relief against the First Respondent are the following :-

15.1 First, that a lease agreement between the Applicant as lessor and the First Respondent as lessee in respect of immovable property, has been validly cancelled by the applicant (on 12 September alternatively 31 October 2018) and as a result, the First Respondent is not entitled to utilise the leased property or the water resources upon the leased property and in any event, that the First Respondent's utilisation of the borehole on the leased property for commercial purposes, constitutes an ongoing violation of the lease agreement. As I have stated before, the dispute regarding the cancellation of the lease agreement will not be dealt with in this judgment for reasons already advanced.

15.2 Second, that in utilising the water resources upon the leased property, the First Respondent has violated and continues to violate the National Water Act and the Applicant seeks an order preventing the ongoing violation of the Water Act by the First Respondent.

15.3 Third, that the Second Respondent called upon the Applicant to stop the extraction of water from borehole 1 for commercial purposes (ostensibly on 19 February 2020) and that the only way in which the Applicant can ensure compliance is by obtaining an interdict against the First Respondent.

15.4 Fourth, that the First Respondent's "*unbridled and unlawful use*" of the borehole places its further viability at risk and as it is the only source of potable water available on the Applicant's property, such extraction places the Applicant at risk of irreparable harm in that, without potable water the value of the Applicant's property will substantially reduce.

The First Respondent's submissions

[16] The First Respondent states that at all relevant times, its business operations consisted of landscaping and irrigation design, landscaping, maintenance of irrigation and a wholesale nursery operation. The First Respondent falls under and is registered as an enterprise under the agricultural Sector Education and Training Authority (SETA) that qualifies as an agricultural enterprise.

[17] Since its inception, the landscaping division of First Respondent's business has been central to its operations in that the nursery division cultivates and grows plants that are supplied to the landscaping division for use in landscaping projects

and as such, the two divisions are from an administrative and financial perspective, integrated.

[18] At the early stages of the First Respondent's business, the First Respondent's business was managed from offices in Stellenbosch whilst its nursery division was situated at Zevenrivieren in the Banhoek Valley. The First Respondent's business currently employs 165 employees of whom 19 work exclusively in the nursery division at the leased property and 4 are employed to manage and perform all the financial, administrative and design functions in respect of both divisions in offices situated in the cottage on the leased property. The rest of the First Respondent's employees are employed in the landscaping division at satellite premises away from the leased property.

[19] The First Respondent further states that during the period 2002 until 2010, one Daryl Peter Sampson ("Sampson") conducted a nursery business, Samgro CC, at the leased property, which it in turn leased from the Applicant, which it says was on similar terms as the lease agreement between the Applicant and the First Respondent. The First Respondent annexed an unsigned lease agreement between Samgro and the Applicant to its answering affidavit. Sampson ostensibly wanted to relocate his business and he and First Respondent entered into negotiations regarding the sale of certain of Samgro's nursery infrastructure.

[20] Pursuant to negotiations during 2010, the First Respondent purchased the nursery infrastructure established at the leased property from Samgro; concluded a lease agreement with the Applicant and proceeded to use such infrastructure in the conduct of its nursery business on the leased property.

[21] The First Respondent states that during the period of the first lease, from 2010 to 2015 and to the knowledge of the Applicant, the First Respondent utilised water extracted from borehole 1 situated on the leased property and at the cottages on the leased property for the nursery division of its business.

[22] The First Respondent alleges that borehole 1 on the leased property was also utilised by Samgro for its nursery business during its tenancy of the leased property. This however was denied by Sampson in a supporting affidavit deposed to by him. In the affidavit, he confirmed that he and the Applicant entered into an oral agreement of lease in respect of the leased property during 2002; that at the time of the agreement, borehole 1 was not yet in existence; and to the best of his knowledge, the borehole was established during or about 2004 and that Samgro CC in fact contributed approximately 50% of the cost of establishing the borehole. He also confirmed that during or about 2010, Samgro CC had sold certain of the structures, equipment and plants of the nursery business conducted by it on the leased property to the First Respondent.

[23] First Respondent also stated that '*to his knowledge'*, Mrs Buchanan, the now sole member of the Applicant, also used water from borehole 1 for washing oyster tanks and vehicles transporting oyster tanks for a business conducted by her under the name Mini Oceans. First Respondent however does not state how he came to this knowledge.

[24] First Respondent also relies on an email sent by the Applicant, which it states presented to it that there was an abundance of water on the property, including three boreholes, available to the First Respondent for use in its business and at the time the email was sent, Mrs Buchanan acting on behalf of the Applicant, was aware of

the water intensive business conducted by the First Respondent. It says that the First Respondent entered into, and extended the lease agreement because of the abundance of water resources.

[25] In this email, sent on 25 September 2014, Mrs Buchanan records the following:

> "*The property has river rights on the Moddergat River, a perennial stream which runs through the property. It has two boreholes, the strongest of which delivers 80,000 litres per hour and a third which is on the boundary. Furthermore the property has 2HA of pressurised irrigation water supplied by Wynland Water from Theewaterskloof dam which is piped underground through an extensive irrigation system. This irrigation system can alternatively be supplied by the boreholes and river water offering three supplies of water. The river water is piped from the weir at the highest point of the property and can supply additional water to any point on the property. This abundance of water has previously been used for aquaculture and nursery usage.*"

[26] The Applicant admits sending the email to Mr Colyn representing the First Respondent, but states that it was sent to assist the First Respondent in obtaining finance to purchase the property from the Applicant.[2]

[27] The lease agreement, as the previous lease had, provides that the First Respondent may *inter alia* use the leased property for residential and agricultural purposes only.

[28] First Respondent also says that neither the lease agreement, nor the previous lease excludes or restricts the use of water from borehole 1 that is situated on the leased property, by the First Respondent for purposes of its nursery business.

[29] The First Respondent states that prior to 2018, there was no record of any complaint by the Applicant about the use of water from borehole 1 by the First

[2] At that stage, the First Respondent was granted a first option to purchase the property in the event that the Applicant decided to sell it.

Respondent for purposes of its nursery business, notwithstanding the fact that the Applicant was clearly aware of such usage. As a result of a drought in the Western Cape during 2018/2019, there was a general shortage of water available in the Western Cape which necessitated an increase in the use of water from borehole 1.

[30] Pursuant to discussions between Mr Colyn and the late Mr Buchanan on behalf of the Applicant, who at that stage was the sole member of the Applicant, the Applicant's attorney addressed a letter to the First Respondent on 23 February 2018 in which he confirmed that the Applicant gave the First Respondent access to water from borehole 1 on certain conditions.

[31] The latter stated that in terms of clause 13 of the agreement of lease, the Applicant allocated the scheme water to which the property was entitled for the use of the lessee, subject to their right to utilize it in terms of emergency or if there was a failure in respect of the borehole; that the annual *quota* runs from September each year and as a result of the excessive use of *quota* water, the First Respondent had already exceeded the *quota* on 12 February 2018. As a result of this, the Wynland Water Users' Association gave notice to the Applicant to terminate the use of the water on 12 February 2018. It recorded that there were two boreholes on the property, namely a borehole that had not been in use for some 20 years; and a borehole (borehole 1) that was utilised for domestic use as described in schedule 1 to the National Water Act.

[32] As a result of this termination, the Applicant gave the First Respondent access to water from borehole 1. Pursuant thereto, the Applicant installed a pump which has resulted in the supply of water to the Applicant's place of residence being interrupted. It concluded that it would be willing to assist only if the First Respondent

could satisfy the Applicant *inter alia* that its water use was in compliance with the National Water Act; and the extraction of water is limited so that the ongoing viability of the water resource was not placed at risk.

[33] On 10 September 2020, Werner Lamprecht, a director of WL Waterworx (Pty) Ltd deposed to a supporting affidavit. In it he stated that during January 2018, the First Respondent contracted Waterworx to inspect a submersible water pump in borehole 1 situated on the leased property that was not functioning properly, and to test the borehole. The test established that the borehole consistently produced 2250 litres per hour of water and not 80 000 litres as alleged by Mrs Buchanan in her email of 25 September 2014, whilst the water level remained constant. It also stated that water from borehole 1 is pumped into a storage tank from where a booster pump pumps water on user demand to the Buchanan household, to the cottage and labourer's cottage on the leased property. Any overflow water is directed from the water tank on the leased property to the First Respondent's nursery when the water tank is full and no other users demand water.

[34] During March 2018 and at the request of the First Respondent, Waterworx also tested the second borehole on the Applicant's property in the presence of Mr Colyn and the late Mr Buchanan, inserted new sleeves in the second borehole and recommended that a pump with a sustainable delivery rate of approximately 70% of its capacity be installed. In doing so, it also tested the water quality of the second borehole and established that the water from the second borehole was potable.

[35] During 2019, Waterworx was again requested by the First Respondent to inspect the water supply from the dam and borehole 1, this after the prolific drought in the Western Cape. After conducting a test over a 72 hr. period, a report concluded

that the borehole yielded 2035 litres per hour from the 11th hour onwards, whilst the water level remained constant at 86m. In light of the test results, Colyn recommended a pump delivery rate of 70% of the consistent yield obtained, equalling 1500 litres per hour and calibrated the pump to regulate the supply not to exceed a yield of 1500 litres per hour.

[36] Waterworx was again called to inspect borehole 1 after the First Respondent advised it that Mrs Buchanan had caused different filters to be installed and had made certain alterations to the water supply system. It reported that the water metre installed at borehole 1 does not record volume or the quantity of water pumped from the borehole 1 to the First Respondent's nursery and neither to any of the recipients of water from borehole 1.

[37] The Applicant takes issue with some of Lamprecht's calculations; for example in the two reports[3] the depth of the same borehole is reflected as 85m and 88m respectively.

[38] In the report dated 1 September 2019 it was alleged that the pump was at a depth of 86m – ostensibly deeper than the actual borehole reflected in the report of 16 January 2018 (WL1) as being 85m.

[39] However, what emerged from the two reports is that the different yields of 2250 litres per hour on 16 January 2018 was considerably more than the yield measured later on 1 September 2019 at just 2035 litres per hour.

[3] Annexures WL1 and WL4

[40] This means that not only was there a marked decrease in the yield, but the water level of the borehole sank from 76m to 86m, this despite an amended calibration of 70% of its alleged capacity.

[41] The First Respondent states that on 10 April 2018, shortly after the sudden passing of Mr Buchanan, who at that stage was the sole member of the Applicant, the Applicant's attorney addressed a letter to the First Respondent in which he stated on behalf of the Applicant:

> *"1.1. As we understand it you are currently drawing approximately 1000 litres per hour from the borehole that has historically been in use (the so-called "cottage borehole"). Subject to the conditions set out in paragraphs 8 and 10 of our letter dated 23 February 2018, our client is prepared to allow the aforesaid level of consumption from the said borehole, provided that is not exceeded and sustainable.*
>
> *1.2 We have also been instructed that you have caused a sleeve to be inserted in the borehole described in sub-paragraph 5.1 of our letter dated 23 February 2018. Our client is prepared to allow you to utilize the said borehole (again subject to the conditions set out in paragraphs 8 and 10 of our letter dated 23 February 2018.)"*

[42] The First Respondent states that the complaints about the First Respondent's use of water extracted from borehole 1 for its nursery business, upon which the Applicant seeks to rely for the cancellation of the lease agreement, only arose after the death of Mr Buchanan on 1 April 2018. The First Respondent claims that this is a vendetta against it and that the Applicant has furthered this aim by rallying the Second Respondent to assist it in achieving its aim. It further states that when this did not succeed, it resorted to these proceedings.

[43] First Respondent concludes that prior to his death, Mr Buchanan agreed to have the second borehole commissioned to provide additional water to the First

Respondent's nursery. This is according to an email sent by him to Mr Colyn on 25 March 2018. What is however apparent from this email is a recordal that borehole 1 was now fully operational, however Mr Colyn advised him that he still required *additional* water; that arrangements were being made to install his old pump in borehole 2 which would be designed to have a week's backup water for the nursery should the other systems go down; and regarding the river supply, that neighbours have been patrolling the river and asking questions about the water supply. He instructed Mr Colyn that the river and weir had to be put back to its original state urgently and that the trench that was dug by him, be filled up before the winter rains.

Can the Applicant seek an interdict to restrain the First Respondent from utilising Borehole 1 in violation of the National Water Act?

[44] Section 22(1) of the National Water Act provides as follows:

> "***22. Permissible water use.***
> *(1) A person may only use water—*
> *(a) without a licence—*
> *(i) if that water use is permissible under Schedule 1;*
> *(ii) if that water use is permissible as a continuation of an existing lawful use; or*
> *(iii) if that water use is permissible in terms of a general authorisation issued under section 39;*
> *(b) if the water use is authorised by a licence under this Act;*
> …
>
> ***Schedule 1***
> *PERMISSIBLE USE OF WATER*
> *[Sections 4 (1) and 22 (1) (a) (i) and Item 2 of Schedule 3]*
> *(1) A person may, subject to this Act—*
> *(a) take water for reasonable domestic use in that person's household, directly from any water resource to which that person has lawful access;*
> *(b) take water for use on land owned or occupied by that person, for—*
> *(i) reasonable domestic use;*
> *(ii) small gardening not for commercial purposes; and*
> *(iii) the watering of animals (excluding feedlots) which graze on that land within the grazing capacity of that land, from any water resource which is situated on or forms a boundary of that land, if the use is not excessive in*

relation to the capacity of the water resource and the needs of other users;

(c) store and use runoff water from a roof;

(d) in emergency situations, take water from any water resource for human consumption or firefighting;

(e) for recreational purposes—

(i) use the water or the water surface of a water resource to which that person has lawful access; or

(ii) portage any boat or canoe on any land adjacent to a watercourse in order to continue boating on that watercourse; and

(f) discharge—

(i) waste or water containing waste; or

(ii) runoff water, including stormwater from any residential, recreational, commercial or industrial site, into a canal, sea outfall or other conduit controlled by another person authorised to undertake the purification, treatment or disposal of waste or water containing waste, subject to the approval of the person controlling the canal, sea outfall or other conduit."

[emphasis added]

[45] It is common cause, on the First Respondent's own version, that it it utilizing and extracting water for its landscaping enterprise. This is not permissible under the National Water Act.

[46] First Respondent denies that it uses the borehole for commercial purposes. In fact, it states that it does not know what the word '*commercial purpose'* is. I am entitled to reject this denial as so implausible and far fetched[4], especially in light of its description of its business in its answering affidavit and the size of the workforce that it employs.

[47] The second contention in its justification for utilizing the water is reliance on the fact that Samgro had also utilised the borehole water on the leased property for its nursery, just as it is doing. Whilst it must be accepted that no borehole existed prior to 2004, on the Applicant's version no borehole existed prior to the purchase of the property, and Sampson's averment that his business contributed to 50% of the

[4] PMG Motors Kyalami (Pty) Ltd and Another v FirstRand Bank Ltd, Wesbank Division 2015 (2) SA 634 (SCA)

cost of installing the borehole, it would make no sense for it to have paid money and not have benefitted from that installation in any way. In that regard, the inference can be drawn that it too utilised water from borehole 1 after its installation in 2004. I will deal with the relevance of the date in a moment. I also accept that based on the lease agreement and the correspondence, that the First Respondent was similarly entitled to utilise water from borehole 1, but within limitations imposed by the Applicant.

[48] Section 1(b)(ii) of Schedule 1 of the National Water Act restricts water use to small gardening not for commercial purposes. The fact that Applicant allowed Samgro to undertake a nursery business on the leased premises - in fact stipulated it as part of a condition precedent to its lease agreement that it purchase Samgro's equipment used in its nursery activities, one can accept that the Applicant at that stage was not too concerned about flouting the provisions of the National Water Act in allowing the nursery operations of Samgro and thereafter the First Respondent. And understandably, this was also the conclusion reached by the Second Respondent when it issued a directive against the Applicant.

[49] However, can the Applicant now rely on an unlawful conduct which was initially granted to an entity, to claim the non-compliance of a provision for the very same conduct that it had previously sanctioned? In other words, whilst it suited the Applicant to turn a blind eye to the contraventions, can it now rely on that very same conduct to penalise the First Respondent?

[50] It is accepted that consent can never be given for an illegal act and that consent to an illegal act does not validate that which is in law, impermissible. If there is a contravention of the Water Act, then such conduct should be dealt in accordance

with the penal provisions as provided for in the Water Act, notwithstanding that such conduct was initially permitted by a landowner. Failing any action taken by the relevant statutory authorities, such party should be interdicted from further unlawful conduct.

Statutory Existing Water Use

[51] The second challenge to its use of borehole 1 for its nursery and landscaping business, is the contention by the First Respondent that the extraction and usage of water from borehole 1, constitutes an existing water use, and therefore permitted in terms of section 22 (1)(a)(ii) the Water Act, which provides that a person may only use water if that water use is permissible as a continuation of an existing lawful use.

[52] Section 32 of the National Water Act, *inter alia*, provides that:

> ***"32 Definition of existing lawful water use***
> *(1) An existing lawful water use means a water use-*
> *(a) which has taken place at any time during a period of two years immediately before the date of commencement of this Act and which–*
> *(i) was authorised by or under any law which was in force immediately before the date of commencement of this Act;*
> *(ii) is a stream flow reduction activity contemplated in section 36 (1); or*
> *(iii) is a controlled activity contemplated in section 37 (1); or*
> *(b) which has been declared an existing lawful water use under section 33."*

[53] Section 34 of the National Water Act, *inter alia*, provides that:

> *"**34 Authority to continue with existing lawful water use***
> *(1) A person, or that person's successor-in-title, may continue with an existing lawful water use, subject to-*

(a) any existing conditions or obligations attaching to that use;
(b) its replacement by a licence in terms of this Act; or
(c) any other limitation or prohibition by or under this Act.

(2) A responsible authority may, subject to any regulation made under section 26 (1) (c), require the registration of an existing lawful water use."

[54] In *Witzenberg Properties (Pty) Ltd v Bokveldskloof Boerdery (Pty) Ltd and Another*, the Western Cape Division (*per* Cloete J) succinctly explained the meaning of an "*existing water use*" as follows:[5]

> "*The concept of 'existing lawful water use' was introduced by ss 4, 22 and 32 – 35 of the NWA. In essence it means that a user is permitted to continue with any actual lawful use which occurred at any time during a period of two years immediately prior to the date of commencement of the NWA, i.e. 1 October 1998 (the qualifying period)*."

[55] The National Water Act commenced on 1 October 1998. To meet the first requirement of Section 32, such use accordingly had to have been in place two years before 1 October 1998. Additionally, even if such use existed, which the Applicant stated it had not, one of the requirements of subsections 1(a)(i) to 1(a)(iii) above also had to be met, and in *casu*, none of those criteria had been established.

[56] Sections 32, 33, 34 and 34 of the National Water Act provide the statutory framework for the continuation of a qualifying existing lawful water use. The Applicant states that none of the above provisions apply in this instance. This is because the use of borehole 1 is not a qualifying 'existing water use', as it was only drilled in 2004. Notwithstanding, the use does not meet any of the other criteria set out in the aforementioned sections and in any event, no such use was registered by the cut-off for submissions of such registrations, which was 3 June 2001.

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[5] 2018 (6) SA 307 (WCC), at para 13.

[57] The First Respondent relied on a desktop study undertaken by a company called Scientific Aquatic Services, instructed by the First Respondent, for this proposition. In the report[6]it states that a borehole was identified within the study area. It went on to state as follows:

> "*As per discussions with the tenant*, this borehole water is utilised for domestic purposes, with additional water utilised for irrigation of the nursery. *As per discussions with the project team*, these boreholes were drilled, and water abstraction commenced prior to 1998….The use of the borehole may therefore be seen as an existing lawful water use (on provision of proof of operation between 1996 – 1998 in accordance with the National Water Act, 1998 (Act No. 36 of 1998)." ("My emphasis")

[58] The report does not specify who the *project team* is comprised of and what information was sourced to come to the conclusion that the boreholes on the leased property *were drilled prior to 1998*. As mentioned before, this is the operative date as '*Existing lawful water uses'* are dealt with in Part 3 of Chapter 3, from sections 32 to 35 of the National Water Act. The inference of course is that it is the First Respondent itself who gave the company the instructions and ostensibly the relevant date (to its advantage) as to when the borehole was ostensibly drilled and it is therefore no surprise that that date just happen to coincide with the timeframe which would qualify the water use from borehole 1 as an 'existing water use'.

[59] Mrs Buchanan states that the second borehole was not operative when she and her late husband took occupation of the property in 1994. The First Respondent denies this but offers no credible evidence, other than what is stated in the report, as a basis for this denial. It then remarkably again refers to the email of 25 September 2014 wherein Mrs Buchanan refers to the features of the property, including water

[6] para 8, page 10 of the report

rights and buildings situated on the property. I have already dealt with the context in which that letter was sent. The Applicant states that this email was sent to Mr Colyn as a motivation to the banks so that he could obtain finance to purchase the property. It is common cause that this did not materialise. The reliance, once again, on that email as proof that the borehole was drilled prior to 1994 is a futile grasping at straws in my view, and is opportunistic and misguided. It then remarkably also relied on the affidavit of Mr Lamprecht in the answering affidavit to confirm that there are three operating boreholes – as ostensible proof that the boreholes existed at that time. But no-where does Lamprecht actually say in his affidavit that the borehole was operative prior to 1994.

[60] The First Respondent thereafter takes issue with the fact that neither the Applicant nor the attorney informed it that borehole 1 was only established during or about 2004. This is because if it is, that would justify the First Respondent's entitlement to extract water from the borehole in terms of section 22(1)(a)(ii) of the National Water Act. I am satisfied that the self-created reliance of a fact (in other the words, its denial) conjured up by the First Respondent to gainsay that which the Applicant says as to when the borehole became operational, can safely be rejected as improbable and false. [7]

[61] The final argument by the First Respondent is the suggestion that the Applicant is able to rectify this defect / unlawful act, by simply registering borehole 1 for commercial purposes. It should be remembered that the starting point of this application is the Applicant's concern that borehole 1 is the only source of potable water for its domestic use on the property, and despite attempts to curb the

[7] See Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E-635D

extraction of water from borehole 1 by the First Respondent for its nursery and landscaping business, that it is concerned about the viability of the water resource.

[62] The tenant essentially wishes to dictate to the landowner what it should do on its own property. If the Applicant promised the First Respondent that it was entitled to operate a landscaping business for commercial purposes on the property in terms of the lease agreement, then that it a dispute that falls outside the ambit of this application. But taking into account the current *status quo*, there is no permit authorizing either the Applicant or the First Respondent from utilizing for the said purpose other than for the purposes as envisaged under subsection 1(b) of Schedule 1 of the National Water Act.

[63] It is trite that an Applicant for final relief must show: (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c), the absence of similar protection by any other ordinary remedy. In dealing with the last leg of the enquiry, I will explore the alternative relief claimed by the Applicant, in the form of a mandamus against the Second Respondent.

Mandamus against the Second Respondent

[64] The Second Respondent has chosen not to participate in these proceedings. This is rather unfortunate, especially given that water is such a precious and unpredictable resource, the protection of which should be of paramount concern to the authorities that are mandated to protect the usage thereof.

[65] It is common cause that there has been several correspondence between the Applicant and the Second Respondent complaining of the First Respondent's non-

compliance of its water use. In February 2019, the Applicant delivered a written complaint regarding the First Respondent's unlawful water usage to the Department. It *inter alia* averred that First Respondent was utilizing water on the property and from water belonging to a neighbouring property in violation of restrictions imposed in terms of the National Water Act. It also complained that First Respondent was using water from the borehole for commercial purposes on an extensive basis. It was also extracting water from the Moddergat River in an unlawful fashion and unlawfully dug a trench into which water was discharged.

[66] On 11 March 2019, the Department through one Mr Mowzer, replied to Mrs Buchanan directly. He agreed with the impact suffered and asserted that he had issued the First Respondent with a "*pre-directive*" to cease all unlawful activities. Mr Mowzer suggested that the Applicant close borehole 1 if it was in control thereof.

[67] On 12 March 2019, the Applicant's legal representative, Mr Kulenkampff ("Kulenkampff") replied to Mr Mowzer, on behalf of the Applicant, and explained why it was not possible to close borehole 1, *inter alia*, since the Applicant relies upon it for domestic water to the main house as its only source of potable water on the property. It requested the Second Respondent to undertake an investigation.

[68] On 20 March 2019, Kulenkampff provided an update to Mr Mowzer in respect of the borehole, extraction of water from the Moddergat River and the trench. That prompted further exchanges that culminated in an e-mail from Mr Mowzer, dated 28 March 2019, confirming that Department had issued a directive to the First Respondent.

[69] On 16 May 2019, Kulenkampff requested the Department to furnish a copy of the directive referred to by Mr Mowzer. However, the response received from the Department on 20 May 2019 was that no direction had been issued. The Department's communication on 20 March 2019, stating that it had issued a directive, was therefore misleading.

[70] Further exchanges between Kulenkampff and Mr Mowzer ensued. In an e-mail dated 7 June 2019, Kulenkampff made the Applicant's position clear with regards to borehole 1:

> "*3. It is blatantly clear that the borehole water is currently being utilised for commercial purposes;*
> *4. Our clients wants to know of and understand the remedial steps that Langverwacht Landscaping (Pty) Ltd had to implement so that it can be satisfied with the implementation thereof;*
> *5. Our client wants to introduce appropriate measures to police the extraction of water from the Moddergat River so that the licence conditions are not exceeded*."

[71] The Applicant further states that in a telephone exchange between Kulenkampff, Mr Mowzer alleged (incorrectly) that the Applicant's own use of the borehole (for domestic purposes) was unlawful "*if it is not registered*". Kulenkampff reminded Mr Mowzer of the provisions of the National Water Act and the fact that the borehole need not be registered with any municipality (as it is not an urban municipal property) for it to be used for domestic purposes.

[72] Thereafter, on 9 September 2019, the Department issued the Applicant with a directive that alleged the Applicant had been in breach of the National Water Act. Kulenkampff responded to that directive two days later, on 11 September 2019. In that response, Kulenkampff pointed out that it is the First Respondent that is unlawfully abstracting water from borehole 1 and called for action against it. The

Applicant stated that its use is a permissible use of water as described in Item 1 of Schedule 1 to the National Water Act.

[73] On 30 September 2019, the Department issued a directive to the First Respondent to cease using the borehole water. In stated that, following a site inspection on 23 August 2019, that the First Respondent *inter alia* immediately cease taking borehole water from the property and apply for authorisation; and provide the Department with readings from the meter regarding its abstraction from the first date of use until 30 September 2019.

[74] On 7 October 2019, the attorneys for First Respondent, Cluver Markotter wrote to the Department, challenging that directive and contending that its abstraction of water from borehole 1 was an "*existing water use*". The only basis for that assertion, it was said, was Mr Mowzer's alleged verbal confirmation that the First Respondent's use constitutes an existing water use.

[75] When there was no further progress, on 4 November 2019, Kulenkampff again wrote to the Department. It was pointed out that the First Respondent had, between the period 10 October 2019 and 31 October 2019, utilised 220 000 litres of borehole water.

[76] On 11 December 2019, Mr Mowzer indicated that the Department would consider criminal proceedings against the First Respondent if it did not cease to use the borehole water.

[77] Thereafter, representatives from the Department visited the property on 20 December 2019 and subsequently delivered a report on 8 January 2020 which, *inter*

alia, reiterated that the First Respondent's commercial use of the borehole had to cease.

[78] On 23 January 2020, a meeting was held between the Applicant, Kulenkampff and representatives from the Department. Pursuant to that meeting, Kulenkampff circulated an e-mail recording the salient points of that meeting, *inter alia* reiterating that the Applicant is not an enforcement authority and requested that the Department ensured that there was no transgression of unlawful acts.

[79] Then, on 13 February 2020, the Department again issued a directive to the First Respondent to:

> "*4.1.1 Immediately cease taking borehole water from the property, and apply for authorisation;*
> *4.1.2 Provide [the Department] with water readings from the meter regarding [its] abstraction from first date f use until 31 January 2020;*
> *4.1.3 Remove plastic lining from the weir on the boundary of Erf 191 Portion 1;*
> *4.1.4 Failure to cease the borehole activities by 16 February 2020, the Department will permanently seal the borehole*."

[80] On 19 February 2020, Cluver Markotter responded to the directive. Again, they contended that the First Respondent's use of the borehole was an existing water use. Again, as substantiation for that assertion, they referred only to Mr Mowzer's alleged characterisation of the First Respondent's use as an existing water use. Since that assertion was not refuted by the Department, they wrote, it must be accepted as true. Additionally, they alleged that any enquiry or action in respect of any unlawful water use must be directed at the Applicant, as landowner. In sum, they alleged that the directive was misdirected at the First Respondent and alleged that "*there is no empowering provision in the National Water Act that allows the*

Department to issue a directive to [the First Respondent] in terms of Section 53(1)(a) of the National Water Act".

[81] Thereafter, also on 19 February 2020, the Department, *per* Mr Mowzer, e-mailed Kulenkampff, enclosing a draft directive that alleged the Applicant to be in breach of the National Water Act. In relevant part, that directive reads:

> "*1. As a result of a site inspection conducted by official from this Department on 07 February 2020, this Department is of the view that you are not complying with the provisions contained in Chapter 4 of the Act and conditions which apply to any authorisation to use water, in that you are undertaking the following:*
>
> *1.1. Unlawfully altered the bed, course and the characteristic of the watercourse;*
>
> *1.2. Directly and indirectly altered the physical, chemical or biological properties of the watercourse;*
>
> *1.3. Taking ground water without water use authorisation.*
>
> *…*
>
> *3. The Department has reached this conclusion as a result of the following:*
>
> *3.1. Site inspection and the investigation conducted by the officials of this Department on 07 February 2020.*"

[82] On 28 February 2020, Cluver Markotter wrote to Kulenkampff, alleging that the Applicant's removal of the plastic lining at the weir constitutes an act of spoliation.

[83] On 9 March 2020, the Department wrote to Kulenkampff, alleging that the Applicant – not the First Respondent – had exceeded the permissible quota of 15 000 m^3 of water, per annum for domestic use, from borehole 1. Without appreciating that borehole 1 is the property's only source of potable water, the letter concluded:

> "*We hereby instruct that your client cease taking water from the borehole and close it*."

[84] On 16 March 2020, Kulenkampff replied to the Department's letter. He reiterated that it was the First Respondent – and not the Applicant – that was at fault.

[85] The Department replied on 17 March 2020. It alleged that the Applicant:

> "*contravened the General Authorisation [under Schedule 1 of the NWA] when [the Applicant] entered into a lease agreement with firstly, Samgro CC, and Langverwacht Landscaping thereafter, which are commercial in nature and not domestic use, as it was intended and registered*."

[86] On the same day, Kulenkampff responded and reiterated that the lease does not afford the First Respondent the right to abstract water from borehole 1.

The Current Status

[87] The Applicant avers that the First Respondent continues to unlawfully abstract millions of litres of water from borehole 1 for commercial use and the Second Respondent has failed to take any action against it, save for issuing the directives referred to above. It states that the Department's position appears to be that the Applicant is at fault for concluding the lease agreement in the first place, notwithstanding the fact that (a) the lease does not contemplate the use of the borehole by the First Respondent and (b) that even if the lease permitted the First Respondent's use, such use remains unlawful in terms of the National Water Act.

[88] The Applicant's states that the aforegoing demonstrates the Applicant's exhaustive efforts to resolve the First Respondent's unlawful commercial use of borehole 1. Accordingly, the Applicant has been left with no alternative but to institute this application.

[89] In my view, it does not belie a tenant to assert whether or not a water use has been an existing water use or not, especially where that tenant has no personal knowledge thereof. The owner of the property would be in the best position to assert the correctness thereof. Furthermore, the reliance by the First Respondent of the previous tenant's water use, to claim it as an existing use would also be of no assistance to the First Respondent in order to justify its own unlawful activities.

[90] The actions of First Respondent leave much to be desired. Not only do they want to dictate what lawful owners can do on their own property, but they then attempt to solicit manufactured information to justify their own unlawful conduct. If the owners no longer want them on their property as tenants, such is their right - they most certainly cannot be bullied into registering a water use, simply to justify the First Respondent continual use of borehole 1 for its commercial use.

[91] It also seems as though they are attempting to bully the owners into submission and take advantage of the situation. Nothing was more evident when, according to the Applicant's founding affidavit, Mr Colyn approached Mrs Buchanan, a mere week after her husband had died, with plans to renovate the leased cottage.

[92] The First Respondent claims that all of these complaints are raised in an attempt to get rid of First Respondent so that Mrs Buchanan's daughter can live on the property. The simple answer is that if the Applicant choses not to renew a lease agreement, or opts to terminate it – such is their right. They will have the usual remedies available to it.

[93] The law in regard to the grant of a final interdict is settled. An Applicant for such an order must show a clear right; an injury actually committed or reasonably

apprehended; and the absence of similar protection by any other ordinary remedy. Once the Applicant has established all three requisite elements for the grant of an interdict, the scope, if any, for refusing relief is limited.[8] The Supreme Court of Appeal in *Hotz*[9] also held that the alternative remedy, had to be a legal remedy. In some instances, the existence of another remedy will preclude the grant of an interdict against injury that is occurring or is apprehended, such as in the case of a statutory breach, where criminal prosecution, in appropriate circumstances, will provide an adequate remedy. However it is clear that despite the Applicant's herculean attempt in engaging the Second Respondent, such effort proved fruitless.

[94] The Second Respondent is derelict in its duties not to act against the First Respondent. They have options of either imposing a fine or charging the First Respondent criminally. Their failure to do this and the First Respondent's cavalier attitude that it is entitled to do what it pleases on another's property with impunity, should not be sanctioned. I am therefore satisfied that even though the Applicant has satisfied the requirements for the grant of a final interdict, that I will exercise my discretion and grant an interim interdict, pending the finalisation of the action proceedings.

In the result, the following order is made.

1. An interim interdict is granted, pending the final determination of the action between the Applicant and the First Respondent under case number 23264/18, interdicting and restraining the First Respondent from:

[8] Hotz and Others v University of Cape Town 2017 (2) SA 485 (SCA) at para 29

[9] Supra para 36

(i) Utilising the borehole identified in annexure “FA5” to the Applicant’s founding affidavit, also known in the application as Borehole 1, in violation of the National Water Act No. 36 of 1998 (as amended).

(ii) Utilising the leased property for any purpose other than residential and agricultural purposes.

2. Furthermore, a *mandamus* is also issued, directing the Second Respondent, the Minister of Human Settlements, Water and Sanitation to comply with its Constitutional and Regulatory obligations by:

(i) Taking immediate steps against the First Respondent to prevent the First Respondent from violating the National Water Act, No. 36 of 1998 in respect of the water resources upon and available on the leased property.

3. Costs will stand over for later determination.

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DS KUSEVITSKY

Judge of the High Court, Western Cape Division

Counsel for Applicant: Adv H van Rensburg
Instructed by Kulenkampf and Associates
Counsel for First Respondent: Adv P Coetsee SC
Instructed by Cluver Markotter Inc.
Counsel for Second Respondent: Notice to abide